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NO. 10-881

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

Henry Raab and Clara Montagna,
Petitioners,

v.

The Borough of Avalon, *et al.*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONERS' REPLY BRIEF IN RESPONSE TO RESPONDENT

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QUESTIONS PRESENTED BY RESPONDENT, BOROUGH OF AVALON

1. Whether Petitioners' Petition was filed late and jurisdictionally barred under Rule 13 for the Supreme Court.

2. Whether Petitioners fail to present an issue worthy of consideration by this Court.

3. Whether Petitioners bring before the Court issues not adjudicated below and or issues related to non-parties.

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REPLY TO RESPONDENT, BOROUGH OF AVALON'S STATEMENT OF THE CASE

Petitioners agree that the "facts" of the case are those found by the Courts in this matter. Where Petitioners cited documentation in the record, it was to question the findings of the Courts that ignored them.

While Avalon argues that the post judgment expungement motion to the trial judge after the New Jersey Supreme Court denial, was simply a "rehash", both the motion Judge (A-23) and Appellate Division (A-12) acknowledged that the title issue was not briefed, argued or decided by the trial Judge in his summary judgment decision, which simply denied just compensation to Petitioners based on their failure to file an inverse condemnation action by April 29, 1971 pursuant to N.J.S.A. 2A:14-1.

Avalon ignores that on July 18, 2005 it recorded (without notice to Petitioners) the trial Court's Summary Judgment order and opinion dated June 5, 2005 in the Cape May County Clerk's office where deeds are recorded and wrongfully claimed the decision affected title to Petitioners' property. Petitioners' appeal to the Appellate Division was filed on July 19, 2005. When Petitioners discovered the recordation in the Avalon Tax Assessor's office in October of 2005, Petitioners and Respondent, Avalon entered into a Tolling Agreement (A-64) allowing Petitioners to address title after all appeals were exhausted, because it was too late to reopen the

summary judgment or supplement the record for the Appellate Division.

The first New Jersey Supreme Court order of September 7, 2007 denied Petitioners' appeal and request for certification.

The motion to expunge was filed on March 24, 2008, not one year later, as asserted by the motion Judge and Avalon's attorney.

Both the trial Court Judge on motion to expunge the recordation and the Appellate Division on the second appeal confirmed that the issue of title had never been briefed, argued or decided. (A-18) (A-12).

The trial Court bifurcated title from just compensation by failing to address title in the summary judgment decision and the record for this case was not complete until the title issue was addressed and the appeals of it were exhausted on October 7, 2010.

REPLY TO RESPONDENT, BOROUGH OF AVALON'S REASONS FOR DENYING THE WRIT

I. U.S. SUPREME COURT RULES 10 AND 13 WERE OBSERVED AND FOLLOWED BY PETITIONERS AND THE FILING WAS TIMELY AND THE COURT MAY GRANT THE PETITION.

U.S. Supreme Court Rule #10 (c) provides that the Court has jurisdiction to accept a Petition for a Writ of Certiorari when "a state court . . . has decided an

important question of federal law that has not, but should be settled by this Court. . . ."

U.S. Supreme Court Rule 13, paragraph 1 provides that "A petition for writ of certiorari seeking review of a judgment of a lower court that is subject to discretionary review by the state court of last resort is timely when it is filed with the clerk within 90 days after entry of the order denying discretionary review."

U.S. Supreme Court Rule 13, paragraph 3 provides ". . . if a petition for rehearing is timely filed in the lower court . . . the time to file the petition for a writ of Certiorari for all parties . . . runs form the date of the denial of rehearing . . . ."

In *Raab v. Borough of Avalon* on motion by Petitioners to the trial Judge requesting expungment of the June 6, 2005 recordation of the original Summary Judgment Order and opinion (A-18), without notice to Petitioners, in the Cape May County Clerk's office with deeds pursuant to N.J.S.A 46:16-1.1 (A-198), which requires that the order and/or decision affect title as a condition of recordation. The motion Judge acknowledged that the ". . . title question was never argued, briefed or decided in the prior proceedings, it is the clear implication of that decision that title vested in the Borough of Avalon in April 1971 upon the failure of Petitioners to seek just compensation." (A-23) The motion Judge acknowledged that ". . . Most likely the Borough should have brought an action for a Declaratory Judgment to clear title." (A-23) The

motion Judge went on to rule ". . . that Avalon now owns the property and has title by way of the taking and that Petitioners' ownership interests are extinguished..." (A-23) Thereafter, the motion Judge entered Declaratory Judgment in favor of Avalon validating the recordation of the initial Summary Judgment order and opinion and confirming title vested automatically in Avalon. (A-26) While the Judge found the vesting of title occurred in 1971 when the six year statute of limitation (N.J.S.A. 2A:14-1) lapsed, he confirmed the 2005 recordation by Avalon, which claimed title as of 1962. (A-18)

In *Raab v. Avalon,* 2009 WL 2224033 (N.J. Super. A.D.), the Appellate Division held that ". . . legal title vested in the Borough as a result of the inverse condemnation that occurred." (A-16).

The Appellate Division also held that "While it is true that the title question was never argued, briefed or decided in the prior proceedings, it is the clear implication of that decision that title vested in the Borough of Avalon in April of 1971 upon the failure of Petitioners to seek just compensation." (A-12)

Both the motion Judge on April 25, 2008 and the Appellate Division ruling on the appeal from the motion Judge's decision acknowledge the title was not addressed in the Summary Judgment decision on June 5, 2005 nor the first Appellate Division decision, 392 N.J. Super. 499 (A.D. 2007).

Accordingly, the second Appellate Division decision was appealed to the New Jersey Supreme Court and

denied on June 30, 2010 (A-1) and Petitioners sought reconsideration in light of *Klumpp v. Avalon,* 202 N.J. 390, 997 A.2d 967 (2010), which was denied on October 7, 2010.

The New Jersey Supreme Court is the court of last resort in New Jersey and it denied the Petitioners' Appeal and Petition for Certification on June 30, 2010 and Petitioners Motion for Reconsideration on October 7, 2010. Based on the last denial on October 7, 2010, the 90th day after was January 5, 2011, the date on which the Petition for Writ of Certiorari to this Court was filed.

Accordingly, the Petition was timely filed with the Clerk of this Court.

II. PETITIONERS' TITLE WAS DECIDED BY THE TRIAL COURT MOTION JUDGE ON APRIL 25, 2008 AND THE APPELLATE DIVISION ON JULY 28, 2009.

Respondent, Avalon misstated the title issue decision dates which were April 25, 2008 on the trial Court Motion to Expunge and July 28, 2009 when the Appellate Division denied the second appeal.

Both courts acknowledged that title to Petitioners' property was not addressed until the trial Court decided the motion to expunge. (A-23) and the Appellate Division decided the appeal from that decision. (A-17) Therefore, the record was not complete until October 7, 2010 when the New Jersey

Supreme Court denied reconsideration of its denial of the 2nd appeal.

III. DUE PROCESS AND EQUAL PROTECTION UNDER THE 5TH AMENDMENT OF THE U.S. CONSTITUTION WAS RAISED BY PETITIONERS.

A. DUE PROCESS: The Petitioners complaint, counts I, II and II, allege violation of the 5th Amendment of the U.S. Constitution and Count V specifically alleges a deprivation of property without due process, just compensation and equal protection in violation of the 14th Amendment of the U.S. Constitution and 42 USC§ 1983.

The first trial Judge's decision on Summary Judgment, the first Appellate Division decision, the second trial Court decision on motion to expunge the recordation of the first trial Court decision and order and the second Appellate Division decision all conclude that Avalon took Petitioners' property without due process, but then concludes that Petitioners are without remedy since they failed to sue by April 1971. How can the courts sanction the automatic vesting of title without notice or due process, when the condemnor acted without observing due process?

Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361, 942 A.2d 59 (App. Div. 2008) was decided February 25, 2008. The Motion to Expunge was filed on March 24, 2008 and decided April 25, 2008. Petitioners' attorney discovered the opinion in *Harrison, id* sometime after the trial Court decision

on the Motion to Expunge and after filing the appeal to the Appellate Division.

However, the case was included and argued in Petitioners brief filed on September 29, 2008 with the Appellate Division, Petitioners brief dated August 17, 2009 on the appeal and petition for certification before the New Jersey Supreme Court and brief on the motion for reconsideration.

B. Equal Protection: *Klumpp v. Avalon*, 202 N.J. 390, 997 A.2d 967 (2010), a companion case to this matter, was decided on June 22, 2010. Petitioners' second appeal and petition for certification to the New Jersey Supreme Court was filed on August 17, 2009 and denied on June 30, 2010.

Therefore, upon learning of the *Klumpp, id* decision of June 22, 2010 and the denial by the New Jersey Supreme Court on June 30, 2010, Petitioners filed a Motion for Reconsideration and brief on July 12, 2010, arguing both due process and the applicability of *Klumpp, id.*

IV. PETITIONERS PRESENT AN IMPORTANT ISSUE TO THE COURT NEVER DECIDED BY NEW JERSEY COURTS OR THE U.S. SUPREME COURT BEFORE THIS CASE.

A. Neither the New Jersey Courts nor the U.S. Supreme Court has decided how or when a condemnor acquires title if a condemnee fails to sue for just compensation within the time permitted by a statute of limitation.

The motion Judge in his opinion dated April 25, 2008 acknowledged that he did not address title (A-23) and then he proceeded to indicate that title to Petitioners property automatically vested in Avalon when the 6 year statute of limitation lapsed in 1971. (A-23) The second Appellate Division decision 2009 WL 2224033 (N.J. Super. A.D.), confirmed that title had not been addressed by the trial Judge in the June 5, 2005 decision, but agreed with the motion Judge that while title had not been addressed, title vested in Avalon in April of 1971 upon failure of Petitioners to file an inverse condemnation action to seek just compensation. (A-12)

The New Jersey Supreme Court denied Petitioners' appeal and Petition for Certification on June 30, 2010 after deciding *Klumpp v. Avalon,* 202 N.J. 390 997 A.2d 967 (2010) which is based on the same essential facts as in *Raab*. Petitioners filed a motion for reconsideration based on the *Klumpp* case, which was denied on October 7, 2010.

Petitioners could not rely on the *Klumpp* case, until it was decided on June 22, 2010. The motion for reconsideration made that decision an issue.

B. Nowhere in *U.S. v. Clarke,* 445 U.S. 253, 100 S.Ct. 1127 (1980) does the Court hold or suggest that, if a statute of limitation time bars an action for inverse condemnation, that title to the subject property "automatically vests" in the would be condemnor. Neither, seizure nor possession equate to legal title in the world of conveyancing real property.

If the case does stand for automatic vesting of title in the condemnor once an action for just compensation is time barred, then it should be reexamined in light of our land title recording system that relies on recorded documents to confirm ownership of real property. Here automatic vesting of title in Avalon as of 1962 or 1971 does not appear until the July 18, 2005 recordation of the Summary Judgment and Order, leaving a gap of 43 or 34 years before recordation.

CONCLUSION

In conclusion, Petitioners point out that Avalon Resolution 62-102 (A-183) adopted on April 15, 1962 in the aftermath of the March 1962 northeast storm that devastated the Avalon coastline authorized Avalon to take emergency control and possession of all property from 13th to 80th Streets in Avalon and further stated that no just compensation would be paid, if it was a valid police power action and if it was a taking of property, just compensation would not be denied, (paragraph 4, A-183 and A-184) leaving the question, "which was it?", never answered by Avalon, until Petitioners filed a Complaint and alleged title to the lots in question and Avalon filed an amended Answer (A-70) on January 3, 2005, which denied Petitioners' claim of title and asserted forfeiture.

Avalon continued taxing the property and accepting payment from the owners without objection and didn't object to any of the two recorded deeds filed by

Tri-Guy Holding Co. Inc. to its shareholders and then from two shareholders and the estate of the third shareholder to Petitioners. In 1983 Avalon responded to Petitioners' attorney that that Avalon was not interested in purchasing Petitioners property, but did not say Avalon owned it. (A-179) In a 2002, State Aid Agreement both the Department of Environmental Protection for beach and sand replenishment and Avalon agreed that it was required to acquire the lots in question making clear Avalon did not believe it owned Petitioners' property.

Had Petitioners checked the law in 1965, they would have found N.J.S.A. 2A:14-1, which did not time bar just compensation, denial of due process, a taking of real property or inverse condemnation.

The often cited case *Morey v. Essex County*, 94 N.J. 427, 10 A. 905 (E and A 1920) involved a continuing trespass plainly covered by N.J.S.A. 2A:14-1 and entitled the property owner to damages for trespass during the previous six years. Why would Petitioners consider that decision to bar just compensation?

In *Harisadan v. City of East Orange,* 187 N.J. Super. 65, 453 A.2d 888 (A.D. 1982) the court did deal with an inverse condemnation regarding a "blighted area" designation, which the court found was continuing, but premature until the designation of blight was lifted or other related activities occurred along with the passage of time.

In the matter of *Russo Farms v. Vineland Board of Education,* 144 N.J. 84, 675 A.2d 1077 (1996), the

New Jersey Supreme Court held that diverting flood water on someone's property was a continuing nuisance and restricted damages to six years prior to the Complaint.

In *287 Corporate Center Assoc. v. Township of Bridgewater,* 101 F.3d 320 (3d Cir. 1996), the court found that when Congress failed to establish a statute of limitation for a federal cause of action, it should look to the most analogous State statute of limitation which it found to be N.J.S.A. 2A:14-1 to time limit an inverse condemnation.

No decision by any Court in New Jersey nor by this Court has ever decided whether title automatically vests in the would be condemnor upon a failure of a would be condemnee to sue for just compensation within the time limit of the statute of limitation such as N.J.S.A. 2A:14-1. (A-190)

Had Petitioners researched the case law of New Jersey regarding statutes of limitations in 1962, 1965 and 1971, they would have found the plain language of N.J.S.A. 2A:14-1 that did not mention inverse condemnation, just compensation, denial of due process or taking of real property until judicially amended by the addition of "inverse condemnation" but not just compensation, due process or taking of real property in 1982 or for sure in 1996. Petitioners suggest Avalon's construction of a dune on their property was a continuing trespass like the road built by Essex County in *Morey Id.* or the flooding called a continuing nuisance as in *Russo Farms Id.*

Avalon first admitted they took Petitioners' property and claimed Petitioners forfeited the property to Avalon when they filed the first amended answer in January 2005. Avalon told the world of the taking of title by automatic vesting when they recorded the June 5, 2005 order and opinion of the trial Judge.

Avalon denied Petitioners due process by failing to condemn the property under the New Jersey Eminent Domain Act, the statutory process to acquire property that guarantees due process (N.J.S.A. 20:3-5 & 6, A-191 and A-192) Avalon concealed the taking by their conduct. Should Avalon be rewarded for ignoring due process?

THE *DeROSE* SOLUTION

In the matter of *Harrison Redevelopment Agency v. DeRose,* 398 N.J. Super. 361, 942 A.2d 59 (A.D. 2008) the New Jersey Appellate Division saved the N.J. Local Redevelopment and Housing Law from a due process flaw by requiring a notice from the municipal entity designating a redevelopment area served on the affected property owner, identifying the land designated for redevelopment and indicating the time limit for the owner to take legal action. When it was too late for the notice to be served, the owner's right to contest the action was preserved.

In order for the Court to rule that Petitioners' self notice was sufficient, the record should confirm that they knew their land was seized and *they had six years to file suit*, something they could not have

known until 1982 or 1996. The record does not reveal any proof that Petitioners' predecessors knew or could have known, in 1962, 1965 or 1971 that they had six years to file suit or title would automatically vest in Avalon.

Shouldn't notice be required in order to avoid such situations, preserve due process and protect our land title recording system? N.J.S.A. 20:3-5 and 6 (A-191 and A-192) mandates such notice and due process and the *DeRose* solution would preserve Petitioners' 5th and 4th Amendment rights, until Avalon condemns the property as mandated by the N.J. Eminent Domain Act.

Petitioners urge the Court to grant a Writ of Certiorari in order to resolve these issues for Petitioners and all others.

Respectfully Submitted,

_____ Dated: April 7, 2011

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